No. 90-373

FILED
OCT 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

# In The
# Supreme Court of the United States
## October Term, 1990

**KPMG Peat Marwick,**

*Petitioner,*

v.

**W. David Holloway, Cal Acree, Betty Acree, Norita Akers, William Akers, Martha Hester Arnold, R.H. Arnold, Maxine Black, Charlotte Broad, John E. Broad, John W. Broad, DeWayne Broad, Jeremy Bush, Doris Cadwell, Howard Cadwell, Joy Donovan, Lisa Holloway, Hugh Hollowell, Claudette Howe, Joyce McClure, Marville McDaniel, Ann McLoud, Beverly Miller, Fred Miller, Vera Miller, Porter-Strait Instrument Co., Inc., Bobbee Ray, Marshall Udden, Mary Udden, United Resources Building Company, Inc., Robert John Walpole, Charlie Woodard, Linda Woodard,**

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION


*Michael Bruce Hyman
Deborah S. Bussert
Much Shelist Freed Denenberg
Ament & Eiger, P.C.
200 N. LaSalle Street, Suite 2100
Chicago, IL 60601-1095
(312) 346-3100

Steven E. Smith
Steven E. Smith & Associates
1201 Fourth National Bank
Tulsa, OK 74119
(918) 582-4107

Charles O. Hanson
Richard K. Holmes
Stewart E. Field
Hanson Holmes Field
& Snider
5918 East 31st Street
Tulsa, OK 74135
(918) 627-4400

Joseph C. Long
300 Timberdell Road
Norman, OK 73019
(405) 325-4699

*Counsel of Record



American Reprographics Management, Inc.™ (312) 332-ARMI



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## QUESTION PRESENTED

Whether the Tenth Circuit Court of Appeals correctly followed *Reves v. Ernst & Young,* 494 U.S. ____, 110 S. Ct. 945 (1990), in holding that certain interest-bearing investment instruments are securities under the federal securities laws, where the instruments were uncollateralized, uninsured, and sold to the public by two Oklahoma finance companies, neither of which was subject to a comprehensive regulatory scheme designed to significantly reduce the risk of the investment instruments.

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## RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request this Court to deny the petition for a writ of certiorari for the reasons set forth below.

## COUNTERSTATEMENT OF THE CASE

The Tenth Circuit Court of Appeals has now ruled twice that the investment certificates at issue here are securities under federal law. Not satisfied with the essential facts of the case, Petitioner tortures those facts to make it appear that the Tenth

Circuit's holding should be reviewed. Contrary to what Petitioner would have the Court believe, banks, savings and loans and the like are not involved in this case. Neither are passbook accounts or certificates of deposit. Rather, the case involves two Oklahoma finance companies, Republic Financial Corporation ("RFC") and Republic Trust & Savings ("RTS"), which sought protection under Chapter 11 of the United States Bankruptcy Code in September, 1984. *In re Republic Trust & Savings Company,* 59 Bankr. 606, 608 (N.D. Okla. 1986). The finance companies were wholly-owned subsidiaries of a holding company named Republic Bancorporation, Inc. ("RBI-II"), the second entity to bear this name, which also declared bankruptcy. Respondents and members of the class they seek to represent invested over $62 million in various securities offered and sold to the general public over several years by RFC and RTS.

The first Republic Bancorporation, Inc. ("RBI-I") was a bank holding company that owned the stock of a state-chartered, FDIC-insured bank, Republic Bank & Trust Company ("Republic Bank").[1] Prior to June 1984, RBI-I also owned the stock of RFC and RTS and 1700 Corporation, a building premises company. As a bank holding company, RBI-I (unlike RBI-II) was subject to the Bank Holding Company Act, 12 U.S.C. §§1841 *et seq.* (1982 & Supp. V 1987) ("BHCA").

## SECURITES ISSUED BY RFC AND RTS

Plaintiffs invested money with RFC, an Oklahoma corporation, and RTS, an Oklahoma trust company.[2] Both institutions operated as finance companies, and both were uninsured. The principal activity of RFC and RTS was the raising of money by the sale, primarily to unsophisticated individual investors, of interest-bearing investment notes with varying maturities. The securities bore various labels, such as:

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[1] RBI-II was *not* a bank holding company and did *not* own stock in any bank. Moreover, neither RFC and RTS nor RBI-II come within the definition of "bank" contained in the Securities Exchange Act of 1934, 15 U.S.C. § 78 (c) (6) (1988).

[2] Although "Trust" appeared in RTS's name, the use of the word is misleading. RTS did not manage or hold trusts or engage in traditional trust business.

Market Rate Savings Thrift Certificate;
Money Market Thrift Certificate;
Two-Year Term Thrift Certificate;
Passbook Savings Certificate;
Negotiable Rate Thrift Certificate; and
Negotiable Rate Term Thrift Certificate.

Most securities fell in the $1,500 to $10,000 range. *Holloway v. Peat Marwick Mitchell & Co.*, 879 F.2d 772, 780 n.6 (10th Cir. 1989), *vacated*, 110 S. Ct. 1314, *reaffirmed*, 900 F.2d 1485 (10th Cir. 1990). The rates of interest offered were competitive with rates paid by other local financial institutions. The proceeds from the sale of the securities were used (1) to increase funds available for lending to customers; (2) to loan funds to their parent in the form of unsecured notes; (3) to redeem previously issued "certificates and other securities" (Exhibit J at 3 to Plaintiff's Motion for Partial Summary Judgment); and (4) to make other investments.[3]

Oklahoma law deemed RFC's and RTS's investment certificates to be securities. Oklahoma Securities Act, OKLA. STAT. tit. 71, §§1, *et seq.* (1983). *See also* Opinions of the Attorney General of Oklahoma, No. 79-353 (December 31, 1979) (Oklahoma Banking Department has statutory responsibility to supervise the issuance of securities in Oklahoma by state-chartered trust companies). RFC issued its investment certificates pursuant to prospectuses approved by the Oklahoma Securities Commission. RTS issued its investment certificates pursuant to offering circulars approved by the Oklahoma Banking Department.

Among other things, the prospectuses and offering circulars describe: (1) the certificates as investment notes offered to the public; (2) the legal authority under which they were issued; (3) the uninsured nature of the investment notes; (4) the use of the investment notes' proceeds; and (5) RFC's and RTS's directors and executive officers. The cover sheet of a prospectus contained the following notice in large type:

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[3] A copy of an RFC prospectus and an RTS offering circular are contained in the Record below.

> THESE SECURITIES ARE OFFERED FOR SALE IN THE STATE OF OKLAHOMA UNDER A PERMIT GRANTED BY THE OKLAHOMA SECURITIES COMMISSION, BUT THIS PERMIT IS PERMISSIVE ONLY AND DOES NOT CONSTITUTE AN APPROVAL, RECOMMENDATION OR ENDORSEMENT, AND IN NO SENSE IS TO BE REPRESENTED AS AN INDICATION OF THE INVESTMENT MERIT OF SUCH SECURITIES. ANY SUCH REPRESENTATION IS UNLAWFUL.
>
> THE SECURITIES OFFERED HEREBY ARE NOT INSURED BY THE FEDERAL DEPOSIT INSURANCE CORPORATION (FDIC), FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION (FSLIC), NATIONAL CREDIT UNION ADMINISTRATION BOARD (NCUA) OR ANY COMPARABLE AGENCY OF THE UNITED STATES OR STATE OF OKLAHOMA. (Emphasis added).

The prospectus also provides that "sale or distribution of the certificates. . . will be handled only by qualified *securities* agents of the company," and that "[n]o certificates are to be offered through underwriters or broker-dealers" (emphasis supplied).

In large type on the front cover of an RTS offering circular was this admonition:

> THESE CERTIFICATES ARE OFFERED FOR SALE IN THE STATE OF OKLAHOMA UNDER AUTHORITY OF TITLE 6) (1001(22), [sic] BUT THIS AUTHORIZATION IS PERMISSIVE ONLY AND THE APPROVAL OF THIS CIRCULAR BY THE BANK COMMISSIONER DOES NOT CONSTITUTE AN APPROVAL, RECOMMENDATION OR ENDORSEMENT AND IN NO SENSE IS TO BE REPRESENTED AS AN INDICATION OF THE INVESTMENT MERIT OF SUCH CERTIFICATES.



> [The Oklahoma Banking Code] states that a trust company may issue **debentures, notes or other evidence of debt** in the manner in which business corporations are authorized to do so for any legal application of proceeds, but only to the extent of any amount equal to ten times its capital and surplus. The certificates issued hereby **are not deposits** and are not insured by any agency of the federal government. (Emphasis added.)[4]

RTS's activities, advertising, loans and debt instruments mimicked those of RFC.[5] Both solicited the public to purchase their various securities principally through newspaper advertisements, prospectuses and offering circulars.

Since RTS was not a bank,[6] it was not subject to the same regulation as a bank. Oklahoma law imposed only three basic requirements on trust companies: (a) capitalization of at least $300,000 (OKLA. STAT. tit. 6, §302(b) (1983)); (b) loans and issuance of indebtedness could not exceed ten times capital and surplus (OKLA. STAT. tit. 6, § 1001 (1983)); and (c) certain deposits had to be maintained against possible malfeasance claims

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[4] The offering circular indicated a "minimum initial investment" required to purchase. The front cover alone contained the word "investment" three times.

[5] For instance, the appearance (which resembled a stock certificate) and wording of a typical certificate issued by RFC was almost identical to a certificate issued by RTS. Typical certificates are reproduced in the Appendix at 1a-3a.

[6] The Oklahoma Banking Code defines "bank" as "any bank authorized by the laws of the state to engage in the banking business." OKLA. STAT. tit. 6, §102(A) (1983).

(OKLA. STAT. tit. 6, § 1004 (1983)).[7] As an Oklahoma trust company, RTS was not required to obtain insurance, nor were any of its instruments insured by any agency of the state or federal government. On the other hand, all national and state banks operating in Oklahoma were required to maintain FDIC insurance. OKLA. STAT. tit. 6, §310(B) (1983).

## ABSENCE OF FEDERAL REGULATION OF RFC AND RTS

No federal bank regulation protects purchasers of debt instruments issued by companies like RFC and RTS. Nothing in the amendments to the BHCA or its legislative history reflects any intent directly to control, supervise or regulate such non-bank entities. In fact, the BHCA is only concerned at all with

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[7] Review of the Oklahoma Banking Code of 1965, OKLA. STAT. tit. 6, §§ 101 *et seq.* (1983), demonstrates that bank depositors at the time were offered protection which was not provided to holders of trust company securities. For example:

(a) §208(4) of the Banking Code provided public access to reports covering shortages of funds at banks. As to RTS this information was confidential.

(b) §218(B) required that a change in bank control be reported to the Banking Commissioner. No such provision existed for trust companies. This is especially relevant since the divestiture of RTS could not have occurred without the Commissioner's approval had RTS been a bank.

(c) §802 limited the maximum a bank could loan to a person or entity, thereby preventing an undue concentration of loans in a bank's portfolio, considered improper banking practice. No such restriction was imposed on RTS.

(d) §809 provided that a bank could not pledge its own assets for the benefit of a customer. This provision did not apply to RTS.

(e) §1404 provided that a managing officer of a bank could not borrow from the bank. This very important safeguard against insider loans and similar transactions did not apply to RTS, which permitted unbridled insider borrowing by its managing officers.

(f) §1406 prohibited a bank from receiving deposits when insolvent. The statute did not apply to RTS, which continued to receive money from investors while insolvent, without interference from the Oklahoma Banking Department.

(g) §1415 (A) provided the Commissioner with the power to obtain an injunction against a bank or bank officers for violation of the Banking Code. There was no provision to prohibit RTS or its officers from similar violations.

non-banks where they are owned by a bank holding company, and then only to ensure that those entities pose no threat to the financial stability of the bank.[8] Section 5(e) of the BHCA allows the Federal Reserve Board ("FRB") to order a bank holding company to terminate its ownership or control of a non-bank subsidiary which "constitutes a serious risk to the financial safety, soundness, or stability of a bank holding company subsidiary bank. . ." 12 U.S.C. §1844(e)(l)(1982). Nothing in §5(e) or anywhere else in the BHCA refers to or provides for the protection of non-bank subsidiaries or the purchasers of their securities where the subsidiary bank's activities threaten the non-bank subsidiaries. The FRB's ultimate enforcement weapon is the ability to force a bank holding company or a bank to divest the non-bank entity.[9] Moreover, the primary reason for an examination of a subsidiary's financial condition is to protect against the "potentially damaging effect on the parent company or its bank subsidiary." Bank Holding Company Supervision Manual at §403.0 (1982).

For several years prior to 1984, the quality of the RFC and RTS loan portfolios had concerned the FRB in its review of RBI-I. Both RFC and RTS had made substantial insider loans to

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[8] For example, RBI-I, the bank holding company which owned Republic Bank, RFC, and RTS, applied for Federal Reserve Board approval under §1843 (c) (8) of the BHCA to acquire the voting shares of Guarantee Trust Company, a failed trust company, and to engage in industrial loan activity through Guarantee Trust. The Board held:

> The Board has frequently indicated that it believes that bank holding companies should constitute a source of financial and managerial strength to their subsidiary banks. From the record relating to this application, it appears that applicant's assumption of 80% of Guarantee Trust's unsecured liabilities could adversely affect its ability to serve as a source of financial strength *to its subsidiary bank.* (emphasis added).

Because the acquisition of Guarantee Trust could adversely impact the stability of the subsidiary bank, the Board denied RBI-I's application. *Republic Bancorporation, Inc.* 67 Fed. Res. Bull. 66 (1981).

[9] Regulation Y of the BHCA specifically addresses the potential impact of non-bank entities on a bank holding company and the FRB's overriding interest in protecting banks. The regulation provides that a bank's holding company shall serve as a source of financial and managerial strength to its subsidiary banks and shall not conduct its operations in an unsafe or unsound manner. 12 C.F.R. §225.4(a) (1989).

their officers and directors, their relatives, and other entities controlled by their officers, directors or their relatives. These loans constituted a large portion of RFC's and RTS's assets. Partly for this reason, on October 27, 1982, the FRB issued a consent cease and desist order to RBI-I. The FRB's concerns were not satisfactorily addressed, and a year later, on October 26, 1983, in response to RBI-I's deteriorating financial condition, the FRB issued a more stringent consent cease and desist order against RBI-I. RBI-I failed to comply with this order.

At about the same time, RBI-I submitted a plan to the FRB calling for the divestiture of RBI-I's bank subsidiary, Republic Bank, to a new bank holding company. However, FRB approval was contingent on RBI-I raising $7 million in new capital for the new holding company. On or about June 4, 1984, the FRB notified the RBI-I Board that, because RBI-I had not raised the new capital, both RBI-I and its directors would be assessed civil money penalties until they complied with the October 26, 1983 cease and desist order.

On June 13, 1984, the FRB issued a termination notice compelling RBI-I to terminate both ownership and control of RFC and RTS. *See Holloway v. Peat, Marwick, Mitchell & Co.*, No. 84-C-814-EU (N.D. Okla. January 2, 1987), *reproduced in* Petitioner's Appendix at 45a (hereinafter the "January 2, 1987 Order").

The FRB's termination notice stated in relevant part:

> The Board of Governors of the Federal Reserve System (the "Board of Governors") has reasonable cause to believe that the continuation of Republic Bancorporation, Inc., Tulsa, Oklahoma ("Republic"), of its ownership and control of Republic Financial Corporation, Tulsa, Oklahoma ("Republic Financial"), and Republic Trust & Savings Corporation of Tulsa, Oklahoma ("Republic Trust"), nonbank subsidiaries of Republic, *constitutes a serious risk to the financial safety, soundness and stability of Republic's bank subsidiary,* the Republic Bank & Trust Company, Tulsa, Oklahoma (recently renamed the Sunbelt Bank & Trust Company) (the "Bank"), and is inconsistent with sound banking principles (emphasis added).

Doc. No. 369, Reply Mem. of Plaintiff in Support of Motion for Partial Summary Judgment.

On June 29, 1984, the name of RBI-I was changed to Sunbelt Bank Corporation, Inc. With no notice of the name swap[10] given to holders of RFC or RTS securities, RBI-I secretly divested itself of RFC and RTS by transferring them to RBI-II, formerly known as Sunbelt Bank Corporation, Inc.[11] Both RFC and RTS continued to issue securities after the divestiture. RFC and RTS investors, along with the general public, discovered the divestiture on September 24, 1984, when RFC and RTS filed for protection under Chapter 11 of the federal bankruptcy code. This lawsuit, alleging, *inter alia,* securities fraud, was filed shortly thereafter.

## SUMMARY OF ARGUMENT

This case does not involve banks, savings and loans or thrifts, nor does it involve certificates of deposit or passbook savings accounts. It *does* involve finance companies selling uninsured investment notes to the general public. The Tenth Circuit correctly held that these instruments are securities for purposes of the antifraud provisions of the federal securities laws.

The conflict among the Circuits, which Petitioner argues requires further review in this Court, is more illusory than real. Only one federal court of appeals' opinion is in direct conflict with that of the Tenth Circuit in this case. That court has not been able to reconsider its opinion in light of *Reves,* as has the Tenth Circuit. Granting the writ to review this alleged conflict would be premature until more courts have the opportunity to consider *Reves* in other factual settings.

Moreover, the Tenth Circuit correctly applied *Reves* and *Marine Bank* to the facts here, properly considering whether the

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[10] The post-divestiture structure consisted of RBI-II, a holding company, with two non-bank subsidiaries, RFC and RTS, and without a bank subsidiary. On the other hand, RBI-I was a bank holding company, and had as its subsidiary Republic Bank. As part of the divestiture, many of the obligations owed to RFC and RTS by RBI-I were assumed by RBI-II, notwithstanding RBI-II's insolvency, and RBI-I was released from those obligations by RFC and RTS.

[11] The investors had no way of knowing that after divestiture RBI-II had become a separate non-bank holding company.

instruments sold by RFC and RTS are securities and whether some other comprehensive federal regulatory scheme makes the protection of the federal securities laws unnecessary. The opinion in no way unduly broadens federal jurisdiction, nor does it undermine any of this Court's prior decisions.

Finally, the writ should not be granted to consider how to interpret the exclusion from the federal securities laws of instruments with a maturity of nine months or less. That issue was not fully briefed and argued below and the Tenth Circuit did not fully consider it. Further, the Court's most recent opinion addressing this issue is less than one year old, and few lower federal courts have had the opportunity to interpret it. Thus, to again address the issue would be premature. Moreover, the interpretation of the exclusion unanimously adopted by the lower federal courts is faithful to both the plain meaning of the statute and its legislative history, and is so well-settled that it should only be changed, if at all, by Congress.

## REASONS FOR DENYING THE WRIT

### I.

### PETITIONER MISSTATES THE TENTH CIRCUIT'S HOLDING WHICH IS LIMITED IN SCOPE AND DOES NOT INVOLVE BANKS OR DEPOSITS

The case presented for the Court's consideration by Petitioner's brief is simply not *this* case.[12] Petitioner refers repeatedly to banks, savings and loans and thrifts (Pet. Brf. at 15, 18, 20, 23, 24), and to certificates of deposit and passbook accounts (Pet. Brf. at 3, 4, 11, 22, 23, 24), none of which is involved in this case.

The case at bar involves two Oklahoma finance companies, both of which were privately owned.[13] Neither company was a

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[12] Only Peat Marwick seeks this Court's review. The remaining defendants, including the corporate officers and directors, have not joined the petition.

[13] This case also involves securities in the form of notes issued by RBI-I and later by RBI-II. As to these instruments, the record is incomplete and the Tenth Circuit remanded for further consideration in accordance with its opinion. *Holloway*, 879 F.2d at 788.

bank, savings and loan or thrift.[14] For much of the relevant period these entities were wholly-owned subsidiaries of a bank holding company. RTS was subject to certain state laws that were different and markedly less stringent than those applicable to state chartered banks, even though administered through the Oklahoma Banking Commission. RFC was subject to no state banking laws at all.

At the federal level, both institutions were reviewed by the FRB, but only to determine whether their existence threatened the bank subsidiary of the holding company.[15] Thus, all of Petitioner's arguments regarding the effect of this case on banks, savings and loans, thrifts and the like are completely misplaced.

Not only does Petitioner mischaracterize the nature of the institutions involved in this case, but Petitioner also recasts the nature of the instruments sold to the public. Contrary to Petitioner's suggestion, this case does not involve deposits, because, by law, neither RFC nor RTS could accept deposits. OKLA. STAT. tit. 6, §§402 *et seq.*, §§1001 *et seq.* (1983); *Holloway*, 879 F.2d at 777 n.4; *In Re Republic Trust & Savings Co.*, 59 Bankr. at 612-13. Rather, the instruments were investment notes of various maturities, which carried either a fixed or variable rate of return.[16]

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[14] The Bank Holding Company Act defines "bank" as an institution which both accepts demand deposits or deposits that the depositor may withdraw by check or similar means, and is engaged in the business of making commercial loans. 12 U.S.C. §1841 (c) (1) (B) (1982 & Supp. V 1987). It defines a thrift institution as (1) a domestic building and loan or savings and loan association, (2) a cooperative bank without capital stock organized and operated for mutual purposes and without profit, (3) any Federal savings bank, (4) certain State-chartered savings banks owned by a holding company, or (5) a mutual savings bank not having capital stock represented by shares. 12 U.S.C. §1841(i) (1982 & Supp. V 1987).

[15] The only reason the FRB was concerned with RFC and RTS at all was that, at the time, they were wholly owned subsidiaries of a bank holding company. Once ownership changed in June 1984, the FRB had no further jurisdiction over them. *Holloway*, 879 F.2d at 787

[16] A number of the certificates were redeemable on demand, subject to a 30-day notice provision and certain limitations on the total amount redeemed during any one period.

For these reasons, all of Petitioner's arguments regarding "the ordinary deposit and passbook activities of banking and financial institutions" are inapposite. (Pet. Brf. at 23.) As this Court's holding in *Marine Bank v. Weaver,* 455 U.S. 551 (1982), makes clear, the traditional commercial banking context is very different and requires an entirely different analysis.[17]

Petitioner also claims that "no one could characterize the institutions at issue as operating in an unregulated environment." (Pet. Brf. at 18.) Petitioner is wrong; both the Tenth Circuit and Respondents do so, as did the District Court in part. Even the District Court held that the RFC instruments were not sufficiently reviewed by federal banking authorities so as to remove them from the protection of the federal securities laws.

As both the District Court and the Tenth Circuit held, there was no federal regulation of RFC and RTS *that was designed to protect their investors. Holloway,* 879 F.2d at 787-88; January 2, 1987 Order. What little federal regulation existed was intended solely to protect the bank subsidiary of RBI-I. As the facts also clearly show, there was no prophylactic state regulation of either company. Petitioner notes, however, somewhat disingenuously, that "insurance aside," the certificates here were regulated in much the same manner as those in *Marine Bank.* (Pet. Brf. at 18.) Even if true, however, insurance was the single most important factor in the Court's decision in *Marine Bank.* Moreover, in that case, the issuer was directly regulated by the FRB. Here, RFC and RTS were reviewed by the FRB only to determine if their existence threatened the bank subsidiary, which the FRB did regulate.

Petitioner claims that the "profound consequences" of the Tenth Circuit's holding make it one which this Court should review. (Pet. Brf. at 15-16.) However, the institutions involved here are *sui generis.* Whether the instruments they sold to the public are securities must be evaluated in the specific factual context presented.

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[17] The very fact that RFC and RTS are in bankruptcy demonstrates that they are not banks. Banks, savings and loans and thrifts are specifically excluded from the United States Bankruptcy Code. 11 U.S.C. §109(b) (1979).

As already noted, banks, savings and loans, and thrifts are not affected by the holding, eliminating the vast majority of the institutions referred to by Petitioner. As to the remaining institutions, to the extent they are the same, the federal securities laws should apply. Cases like this one, where there is no pervasive, protective regulation, are precisely why the federal securities laws were enacted.

Institutions like RFC and RTS are often formed to avoid the comprehensive federal or state banking laws and regulations. Silkey and Pringle, *Trust Companies: Oklahoma's Own Variety of Non-Bank Banks,* 9 Okla. City U.L. Rev. 293 (1984). Indeed,

> RFC and RTS were almost identical twins, doing business in the same building, and operat[ing] their businesses in such a manner as to cause confusion to customers concerning the capacity in which each corporation functioned. Each corporation essentially covered for the other as to many business matters, even assuming the duties and responsibilities of the other to carry on business.

*In re Republic Financial Corporation,* 47 Bankr. 766, 770 (N.D. Okla. 1985). For such institutions, the rationale behind the *Marine Bank* exception is absent. For this reason, the Tenth Circuit was correct in holding that the instruments issued by RFC and RTS are securities and that their holders may seek a remedy under the federal securities laws. Without these remedies, investors are left with little recourse.

Contrary to Petitioner's argument, the holding below will in no way broaden federal jurisdiction beyond what Congress intended. (Pet. Brf. at 21.) Rather, the Tenth Circuit has applied the antifraud provisions of the federal securities laws to unregulated, uninsured companies which sold securities to the general public. This is exactly as Congress intended the federal securities laws to be used, and as they have been applied for over fifty years.

Nor does the opinion create irreconcilable conflicts between the disclosure goals of the federal securities laws and confidentiality requirements of financial institutions. (Pet. Brf. at 20.)

The opinion does not even address the issue of disclosure by such entities as banks and savings and loans with regard to their lending and investment activities. Confidentiality may be maintained for these activities because investors are protected by the FRB acting on their behalf to monitor the issuers and take corrective action to protect their investments. *Holloway,* 879 F.2d at 786. Where companies like RFC and RTS are selling *securities* to the public, however, a wholly separate activity, full disclosure as required by the securities laws is investors' only protection.[18] As this Court has often held, a primary purpose of the federal securities laws is to provide investors with full disclosure of material information concerning sales of securities. *See, e.g., Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 195 (1976).

## II.

## THE TENTH CIRCUIT'S OPINION CONFORMS TO THIS COURT'S DECISIONS IN *MARINE BANK* AND *REVES* AND DOES NOT WARRANT REVIEW

Petitioner claims the writ should be granted because the Tenth Circuit's opinion regarding state regulation conflicts with decisions of other Circuits which have considered the issue. (Pet. Brf. at 19.) Petitioner also claims that the opinion raises important questions that justify granting the writ. On both counts, Petitioner is wrong.

In fact, only a single opinion is in direct conflict with the Tenth Circuit's holding here. Of all the cases Petitioner claims conflict with the Tenth Circuit, only *Tafflin v. Levitt,* 865 F.2d 595 (4th Cir. 1989), *aff'd on unrelated issue,* 110 S. Ct. 792 (1990), involved a state regulatory structure which included insurance designed to protect the public. The other cases Petitioner cites, *West v. Multibanco Comermex, S.A.,* 807 F.2d 820 (9th Cir.), *cert. denied,* 482 U.S. 906 (1987); *Callejo v. Bancomer, S.A.,* 764 F.2d 1101 (5th Cir. 1985); *Wolf v. Banco Nacional de Mexico, S.A.,* 739 F.2d 1458 (9th Cir. 1984), *cert. denied,* 469 U.S. 1108 (1985), are factually distinguishable. All involved banks, certificates of

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[18] The FRB has no jurisdiction over securities issued by bank holding companies or their nonbank subsidiaries. *Benson Banc Shares,* 63 Fed. Res. Bull. 1009 (1977); *Suburban Bancorp,* 71 Fed. Res. Bull. 581 (1985).

deposit (in Mexican pesos), and insurance against insolvency losses. Moreover, all involved foreign policy issues completely absent here, and none considered whether state banking regulation could ever satisfy *Marine Bank,* or if so, the extent of state regulation that would suffice.[19]

All of the cases Petitioner cites were decided before this Court's opinion in *Reves.* To the extent the cases conflict with *Reves,* they are no longer good law. Only the Tenth Circuit has had the opportunity to review its decision in light of *Reves.* Applying that decision to the facts before it, the Tenth Circuit determined that its prior holding was correct. Until other Circuit Courts have had a similar opportunity, it would be ill-advisedly premature for this Court to review this alleged conflict among the Circuits.

Moreover, the Tenth Circuit correctly applied *Reves.* In *Reves,* this Court adopted the "family resemblance test" for determining whether a note is or is not a security. The Court identified four factors which must be examined in making that determination. The fourth factor the Court identified is "whether some factor such as the existence of another regulatory scheme significantly reduces the risk of the instrument, thereby rendering application of the Securities Acts unnecessary." *Reves,* 494 U.S. at ____, 110 S. Ct. at 952.

Applying the fourth factor in *Reves,* the Court stated:

> [W]e find no risk-reducing factor to suggest that these instruments are not in fact securities. The notes are uncollateralized and uninsured. Moreover, unlike the certificates of deposit in *Marine Bank,* supra, at 557-558, which were insured by the Federal Deposit Insurance Corporation and subject to substantial regulation under the federal banking laws, and unlike the pension plan in *Teamsters v. Daniel,* 439 U.S. 551, 569-570 (1979), which was comprehensively regulated under the Employee Retirement Income Security Act of 1974, 88 Stat. 829, 29 U.S.C. sec. 1001 *et seq.,* the

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[19] The Tenth Circuit did indicate that it disagreed with the reasoning of these cases.

> **notes here would escape federal regulation entirely if the Act were held not to apply.**

*Id.* at 953 (emphasis supplied).

Like the securities in *Reves*, the securities issued by RFC and RTS were uncollateralized and uninsured. Also like the securities in *Reves*, the RFC and RTS instruments would evade federal regulation entirely if the federal securities acts were held not to apply.

In applying *Reves* to the instant factual situation, the Tenth Circuit first "presume[d] that the instruments are securities." It then reviewed the judicially created list of nonsecurities and determined that the instruments at issue here do not resemble any of them. It next "examine[d] the instruments in light of the four guideline factors to decide whether [they] should be added to the judicial list of nonsecurities." *Holloway*, 900 F.2d at 1487.

The Tenth Circuit concluded that although the *Reves* four factor approach superseded its own eight factor analysis, most of the factors used in its previous approach were included in the *Reves* analysis. Most importantly, the result remained the same. *Id.* at 1488. The Court noted that the major analytical difference between *Reves* and its prior approach was in the treatment of other regulatory schemes. The Tenth Circuit held that under *Reves*, the existence of another regulatory scheme which significantly reduces the risk of the instrument is to be considered as one of the four factors, not as a separate consideration which might remove the instrument from the protection of the federal securities laws even if it otherwise qualified as a security. The Court also noted that in this case the change in emphasis did not change the result. *Id.* at 1488 n. 1.

The Tenth Circuit correctly observed that although *Reves* does not directly address the question whether federal courts may consider state regulation when evaluating whether a note is a security, the emphasis of the case was clearly on federal regulation. Moreover, the majority opinion rejected application of state law on the question of when a demand note matures, in favor of a federal rule "designed to further the remedial purposes of the Acts." *Id.* at 1488. Based on all this, the Court correctly reaffirmed its prior holding that only federal regulation may be considered. *Id.*

Although Petitioner states in passing that the securities issued here were subject to substantial federal regulation, in fact the opposite was true. (Pet. Brf. at 18 n. 18.)[20] As the Tenth Circuit noted in its opinion, prior to the divestiture, both RFC and RTS were subject to review by the FRB as subsidiaries of a bank holding company. The primary purpose of this review, however, was to protect the stability and financial viability of a bank. If the holding company or its nonbank subsidiaries engaged in activities that threatened the financial stability of the bank subsidiary, the FRB could order divestiture of the nonbank entities to protect the bank's depositors.[21]

Any protection afforded the investors in RFC and RTS as a result of the FRB review of the nonbank subsidiaries was manifestly incidental to the protection of the bank's depositors. RFC and RTS investors were thus wholly dependent on the coincidence of their interests with those of the bank's depositors. The Tenth Circuit agreed that this was not the "abundant protection" contemplated by *Marine Bank*, and was not sufficient to remove these instruments from the protection of the federal securities laws. *Id.* at 787-88; 12 C.F.R. §225.4(a)(1988).

Petitioner claims that the Tenth Circuit erred in refusing to consider state regulation in determining whether the RFC and RTS instruments are securities. In both *Marine Bank* and *Reves*, however, this Court focused on federal regulation. *Marine Bank*, 455 U.S. at 558-59; *Reves*, 494 U.S. at ___, 110 S. Ct. at 953. The Tenth Circuit's reasoning is entirely consistent with those holdings.[22]

Petitioner, however, citing *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 849 (1975), argues that the securities laws were only meant to cover instruments not otherwise

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[20] Petitioner ignores the fact that the regulatory environment surrounding these entities changed after the divestiture, of which investors were unaware until the bankruptcy.

[21] This is exactly what happened in June 1984, when the FRB finally ordered RBI-II to divest itself of RFC and RTS. The bankruptcy followed shortly thereafter.

[22] In any event, this part of the Tenth Circuit's holding was not necessary to its conclusion that under the facts presented, the instruments were securities.

regulated. Incredibly, Petitioner argues that because the state of Oklahoma had certain regulatory responsibility, the federal securities laws should not apply here. This argument must fail.

At the time the federal securities laws were enacted, no comprehensive federal regulation of securities existed. *State* regulation, however, had long been in force. Indeed, by the time the 1934 Act was passed, every state except Nevada had some form of securities act. *Oppenheimer & Co. v. Young*, 456 So. 2d 1175, 1177 (1984), *vacated on other grounds*, 470 U.S. 1078 (1985). *See also* 5 Jacobs, *Litigation and Practice under 10b-5*, §4, at p. 1-169-70 (2d ed. rev. 1989). Congress enacted the federal securities laws because state securities regulation, with its limited jurisdiction, was inadequate to protect investors in a securities market which was increasingly national in scope. J. Long, *Blue Sky Law*, 12 Securities Law Series §1.01, at p. 1-1 (1989). *See also* L. Loss and E. Cowett, *Blue Sky Law* 30-5 (1958). Furthermore, both Section 18 of the 1933 Act and section 28 of the 1934 Act explicitly provide for concurrent federal and state regulation. 15 U.S.C. §§77(s); 78bb(a) (1988). Congress was obviously aware of the existing state regulation when it enacted the federal securities laws, but deemed it inadequate. Given this background, the Tenth Circuit was correct in looking only at whether a comprehensive set of federal regulations adequately protects investors.[23]

This Court has also recognized that the mere existence of some state regulation, even as extensive as the state regulation governing insurance, does not mean that the federal securities laws do not apply. *SEC v. Variable Annuity Life Insurance Co.*, 359 U.S. 65, 75 (1959)(variable annuity contracts are securities, subject to the antifraud provisions of the federal securities laws, even though insurance companies and contracts are highly regulated by the states and are specifically exempt from the registration requirements of the federal securities laws).

Moreover, even if it is incorrect to completely discount state regulation in determining whether an instrument is subject to

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[23] *Teamsters v. Daniel*, 439 U.S. 551 (1979), also supports the Tenth Circuit's reasoning. In that case, this Court held that a pension plan is not a security because *another federal statute*, ERISA, provides adequate protection to those covered by pension plans.

the federal securities laws, the state regulation in this case was negligible. RFC was supervised only by the Oklahoma Securities Commission. Not even Petitioner argues that this removes RFC's securities from the federal securities laws. Virtually all securities are regulated by both the federal securities laws and the securities laws of the states in which they are sold.

RTS was subject to a certain amount of review by the Oklahoma Banking Commission, but was uninsured by any fund. As discussed above, the state regulation that did exist was altogether deficient and perfunctory. For that reason, even if existing state regulation is considered here, it does not satisfy the *Marine Bank* requirement that such regulation abundantly protect the public from the risk of insolvency. *Marine Bank,* 455 U.S. at 558-59.

Petitioner claims that the Tenth Circuit's interpretation of *Reves* raises issues "previously thought resolved." (Pet. Brf. at 16.) Petitioner concludes that the treatment of federally regulated and insured bank certificates of deposit under the securities acts must now be considered susceptible to "modification and elaboration." Although no case is identified, Petitioner apparently refers to *Marine Bank*. Petitioner has either completely misread or intentionally mischaracterized the Tenth Circuit's opinion.

Petitioner's argument that somehow the Tenth Circuit's opinion calls into question settled law defies logic. As discussed above, the Tenth Circuit recognized that comprehensive federal regulation and insurance, such as existed in *Marine Bank*, must be analyzed under the fourth factor of *Reves* — the existence of another regulatory scheme which significantly reduces the risk of the instrument. The Tenth Circuit's holding in no way undermines *Marine Bank*.

## III.

## THE TENTH CIRCUIT CORRECTLY HELD THAT THE INSTRUMENTS SOLD BY RFC AND RTS ARE SECURITIES

Petitioner claims that the Tenth Circuit failed to consider the language of the statute in determining that the instruments sold to the public by RFC and RTS are securities. (Pet. Brf. at 21.) In so arguing, Petitioner repeatedly distorts the nature of

the instruments at issue. Unhappy with the real character of the certificates, Petitioner persists in erroneously referring to them as "passbook accounts" and "certificates of deposit." Based on this false premise, Petitioner then argues that because passbook accounts and certificates of deposit were well known to Congress in 1934, but were not specifically enumerated in the statute, Congress cannot have meant to include them in its definition of a security. Petitioner's argument belongs in another case. Neither passbook accounts nor certificates of deposit are involved here.[24]

As the Bankruptcy Court noted, because RTS was a trust company, not a bank,

> [it] was not authorized to, nor did it, accept demand deposits on which checks were drawn or permitted. "Deposits" of non-trust moneys with Republic Trust were therefore not deposits (that is, bailments) at all; but were loans made by the creditors of Republic Trust, which Republic Trust promised to repay and for which Republic Trust issued certificates, not of deposit, but of indebtedness.

*In re Republic Trust & Savings Co.*, 59 Bankr. at 613. As an Oklahoma trust company, moreover, RTS was specifically permitted to issue securities. Opinion of the Attorney General of Oklahoma, No. 79-353, December 31, 1979.

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[24] Petitioner argues that because the certificates have been referred to as deposits in other contexts, that designation is controlling here. (Pet. Brf. at 5.) Many of the references Petitioner points to merely state that the certificates were "deposit-like." Petitioner acknowledges that the offering circulars and prospectuses specifically stated that the certificates offered were not deposits. Surely, that declaration should be dispositive. Moreover, under Oklahoma law, neither institution was legally able to accept "deposits." The Tenth Circuit itself recently described the instruments at issue as "debt instruments, representing a promise by the issuing entity to repay . . . akin to promissory notes . . ." *In re Republic Trust & Savings Company*, 897 F.2d 1041, 1043-44 (10th Cir. 1990).

The discussion in *Oklahoma Bankers' Assoc. v. Federal Reserve Board*, 766 F.2d 1446, 1448-50 (10th Cir. 1985), relied on by Petitioner, is not contrary. There, the Court was concerned with regulation of interstate banking by the Federal Reserve Board, certain definitional questions, and a wholly different institution.

RFC, of course, was a finance company, an ordinary corporation. To label the instruments it issued as either passbooks or certificates of deposit is to attempt to convert RFC into a bank. In fact, as Petitioner acknowledges, both RFC and RTS sold the certificates through prospectuses and offering circulars which characterized them *not* as deposits but as securities and investments. They should be taken at their word. *Reves,* 494 U.S. at ____, 110 S. Ct. at 953.

All of Petitioner's arguments that Congress did not intend to regulate the ordinary deposit and passbook activities of banks under the securities acts are irrelevant. The Tenth Circuit correctly analyzed the instruments issued by RFC and RTS as "evidences of indebtedness." *Holloway,* 879 F.2d at 782. It then correctly concluded that the regulation of these instruments was not such as would remove them from the protection of the federal securities laws, and that the *Reves* factors did not change the result. 900 F.2d at 1488. Both the procedure used and the result reached are correct on the facts here, and do not require this Court's review.

Petitioner claims that the Tenth Circuit's opinion is contrary to Congress' intent in enacting the Glass-Steagall Act to govern banks and the federal securities laws to govern the securities markets. (Pet. Brf. at 20.) Petitioner points to section 21 of the Glass-Steagall Act, 12 U.S.C. §378, which it claims explicitly states that state regulation of an institution is sufficienct to remove the institution from the federal securities laws.

Petitioner misreads section 21. That section is very simple. It provides that (1) no institution which accepts demand deposits or the like may also deal in securities, except in certain limited ways, and (2) in order to accept demand deposits, the institution must be regulated by some federal or state banking authority. *See generally Securities Industry Assoc. v. Board of Governors, Federal Reserve System,* 468 U.S. 137, 148-149 (1984). Section 21 has nothing to do with what sort of alternative regulation makes the protection of the federal securities laws unnecessary. Section 21 can in no way be read to provide that regulation by a state or federal banking agency means that investments issued by that institution are exempt from the federal securities laws. Moreover, as discussed above, neither RFC nor RTS accepted demand deposits. Section 21 is simply irrelevant.

## IV.

## THIS IS NOT THE APPROPRIATE CASE TO RESOLVE QUESTIONS AS TO NOTES OF NINE MONTHS DURATION OR LESS

Petitioner argues that this Court should grant the writ to resolve a question left open in *Reves* - how to interpret 15 U.S.C. §78c(a)(10), which provides that, "unless the context otherwise requires," the definition of security does not include notes "with a maturity at the time of issuance of not exceeding nine months." Petitioner argues for a literal interpretation of the section, often known as the "commercial paper" exception, despite the fact that the lower federal courts and the SEC

> have been unanimous in rejecting a literal reading of that exclusion. They have instead concluded that "when Congress spoke of notes with a maturity not exceeding nine months, it meant commercial paper, not investment securities." *Reves*, 494 U.S. at ____, 110 S. Ct. at 955-56 (Stevens J., concurring), citing *Sanders v. John Nuveen & Co.*, 463 F.2d 1075, 1080 (7th Cir.), *cert. denied*, 409 U.S. 1009 (1972).

Petitioner claims that taken together, the Court's opinions in *Reves* suggest that a "substantial reason" must exist to justify ignoring the statute's literal language. (Pet. Brf. at 25.) In fact, however, the majority in *Reves* was careful to express no opinion on the question. Instead, the Court held that even assuming the exception was not limited to commercial paper, the notes at issue in *Reves* were securities. *Id.* at 955. The Court thus carefully avoided expressing any opinion.[25]

This is not the proper case for the Court to decide this issue. Whether the exception for notes with a maturity of nine months or less should be literally applied was not argued below. Moreover, the opinion in *Reves* is just seven months old, and only a few courts have had the opportunity to consider *Reves'* discussion of the exception. *See, e.g., Singer v. Livoti*, 741 F. Supp. 1040

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[25] The dissenting justices did argue for a literal interpretation of the exception. *Id.* at 957.

(S.D.N.Y. 1990). For this Court to revisit the issue so soon after *Reves,* in a case where it was at most a tangential issue below, would be inappropriate.

Despite having failed to raise the issue below, Petitioner argues that this Court should grant the writ. It claims that the Tenth Circuit's holding regarding the exception for notes of less than nine months maturity is without support. Petitioner admits, however, as it must, that the Tenth Circuit's holding simply follows the holding of every other court which has considered the issue. (Pet. Brf. at 26.)[26]

In fact, as every court has concluded, the settled interpretation of the commercial paper exception is faithful to the statutory language. Both the definitions in the 1933 and the 1934 Act apply "unless the context otherwise requires . . . " 15 U.S.C. §§77(a)(3); 78(c)(10) (1988). Using the context clause to exclude only short term commercial paper and not all short term securities is faithful to the plain meaning of the statute and legislative history, while still affording the flexibility that all courts and commentators have recognized is necessary to give effect to the overriding purposes of the securities laws.

The purpose of the securities laws is to ensure that persons who purchase financial instruments offered to the public as

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[26] The reasoning behind this long line of decisions is well known. The analysis includes an examination of the statutory language itself, the purpose of the federal securities laws, their interpretation by the SEC and the legislative history of the relevant sections. *See, e.g., Baurer v. Planning Group, Inc.,* 669 F.2d 770 (D. C. Cir. 1981); *McClure v. First National Bank,* 497 F.2d 490 (5th Cir. 1974), *cert. denied,* 420 U.S. 930 (1975); *Zabriskie v. Lewis,* 507 F.2d 546 (10th Cir. 1974); *Zeller v. Bogue Electric Mfg. Corp.,* 476 F.2d 795 (2d Cir.), *cert. denied,* 414 U.S. 908 (1973); *Sanders v. John Nuveen & Co., Inc.,* 463 F.2d 1075 (7th Cir.), *cert. denied,* 409 U.S. 1009 (1972).

Every one of these courts has reached the inescapable conclusion that the exception should not be read literally, but should be limited to commercial paper or similar instruments. Indeed, this case law is so well-settled that Justice Stevens concluded in his concurring opinion in *Reves* that

> [it] should not be disturbed unless and until Congress so decides.. . . . A departure from this reliable consensus would upset the justified expectations of both the legal and investment communities.

*Reves* at 956. These decisions should not be reviewed without giving the lower federal courts an opportunity to consider *Reves.*

investments are fully and accurately informed about the investment's relevant features, including its risks. At the time of their enactment, Congress was well aware that "the public in the past ha[d] sustained severe losses through practices neither ethical nor honest on the part of many persons and corporations selling securities." H.R. Rep. No. 85, 73d Cong., 1st Sess. 1 (1933). For that reason, Congress insisted that sellers of securities must not conceal any important information from the buying public. *Id.* at 2. *See also* H.R. Rep. No. 1383, 73d Cong., 2d Sess. 105 (1934).

Invoking the context clause to limit the scope of the exclusion to transactions in commercial paper (or its close equivalent) will ensure that the exclusion is not used to frustrate or circumvent the purposes of the statute. It is inconceivable that Congress intended §3(a)(3) to exempt from registration a periodic public offering of an issuer's own notes to small investors simply because their maturity was less than nine months. *S.E.C. v. American Bd. of Trade,* 751 F.2d 529, 539 (2d Cir. 1984).

This approach is also consistent with the legislative history. Although little direct evidence exists as to why Congress included the term "any note" in the definition of a security, the historical context suggests that inclusion of this term reflected a desire to define "security" broadly enough to encompass a wide variety of financial instruments.[27] That Congress intended to provide protection to the public who buy notes as investments is particularly evident from the legislative history of the statutory exemption for notes and certain other debt instruments of less than nine months maturity; what is generally called commercial paper. Congress recognized that parties to such transactions in the commercial paper market, in which ordinary members of the investing public rarely participated, did not need the same

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[27] "Note" was understood at that time, as it is today, to refer to a promise to pay, either on demand or at a fixed or determinable time in the future, a sum certain to order or bearer. This definition was used in the Uniform Negotiable Instruments Act, first enacted in New York in 1897, which had been enacted in all states by 1924. *See* Guttman, *Article 3 Commercial Paper: An Updating of Well-Tried Concepts,* 11 How. L.J. 49, 51 n.23 (1965).

protection as the public at large. *See* H.R. Rep. No. 85, 73d Cong., 1st Sess. 15 (1933).[28]

The legislative history of section 3(a)(3) of the Securities Act applies equally to the Exchange Act's exclusion in Section 3(1)(10). While there are no reported legislative comments regarding the Exchange Act's exclusion of short-term notes, in light of the virtually identical definitions of "security" in the Securities Act and the Exchange Act, courts have routinely used the legislative history surrounding the Securities Act's exemption for short-term commercial notes to interpret the Exchange Act's exclusion. *See, e.g., S.E.C. v. American Board of Trade,* 751 F.2d at 538-40; *Baurer v. Planning Group, Inc.,* 669 F.2d at 775-77; *McClure v. First National Bank of Lubbock, Texas,* 497 F.2d at 493 n.1.

The decisions of all of the federal appellate courts and the SEC that the exclusion for notes with a maturity of nine months or less applies only to commercial paper are correct and should not be disturbed.

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[28] The original draft of the bill that became the Securities Act contained no exemption for short-term commercial paper. Testimony and comments from members of the Federal Reserve Board, the Investment Bankers Association of America and others prompted Congress to reconsider. These statements indicated that a limited exemption from registration was warranted because these business financing instruments were generally sold only to a sophisticated class of professionals, not to the general public. See comments quoted in *Federal Securities Act: Hearing on H. R. 4314 Before the House Comm. on Interstate and Foreign Commerce,* 73d Cong., 1st Sess. 180 (1933); *Securities Act: Hearings on S. 875 Before the Senate Comm. on Banking and Currency,* 73d Cong. 1st Sess. 94 (1933).

## CONCLUSION

For the foregoing reasons, Respondents respectfully request the Court to deny the petition for a writ of certiorari.

Dated: Chicago, Illinois
October 12, 1990

Respectfully submitted,

*MICHAEL BRUCE HYMAN
DEBORAH S. BUSSERT
MUCH SHELIST FREED DENENBERG AMENT & EIGER, P.C.
200 N. LaSalle Street, Suite 2100
Chicago, IL 60601-1095
(312) 346-3100

STEVEN E. SMITH
STEVEN E. SMITH & ASSOCIATES
1201 Fourth National Bank
Tulsa, OK 74119
(918) 582-4107

*Counsel of Record

CHARLES O. HANSON
RICHARD K. HOLMES
STEWART E. FIELD
HANSON HOLMES FIELD & SNIDER
5918 East 31st Street
Tulsa, OK 74135
(918) 627-4400

JOSEPH C. LONG
300 Timberdell Road
Norman, OK 73019
(405) 325-4699

*Counsel for Respondents*

# APPENDIX

BEST AVAILABLE COPY

**Exhibit 8 to**
**Plaintiffs' Amended Complaint**

**REPUBLIC FINANCIAL CORPORATION**

NAME Jeremy K. or Shirley Bush Matures June 6, 1985
ADDRESS 5009 Deano Place, Route 8, Claremore, OK 74017

804755

**NEGOTIABLE RATE TERMS THRIFT CERTIFICATE**

THIS IS TO CERTIFY that for value received this certificate has this date been issued to JEREMY K OR SHIRLEY BUSH for and in consideration of the sum of $ ONE THOUSAND TWO HUNDRED FIFTY DOLLARS * * *(1,250.00)********** Dollars cash in hand paid, the receipt of which is hereby acknowledged. This certificate shall bear interest at 12.50% per annum, compounded or payable quarterly and shall be due and payable ONE year(s) from date and shall be payable only upon surrender of this certificate. The Company reserves the right to redeem this certificate at any time after issue upon thirty (30) days written notice to the holder hereof of its intention to redeem. The holder of this certificate may redeem this certificate at any time after issue provided, however, that the Company may require thirty (30) days written notice to the Company of such intention to redeem and that the Company reserves the right to limit all redemptions of certificates in any calendar month to fifty percent (50%) of the net cash flow of the Company for the preceeding calendar month; and further provided that a substantial early withdrawal interest penalty will apply. In the event of early withdrawal, this certificate will receive interest equal to the rate currently in effect for Passbook Savings Certificates less an amount equal to three months interest at such rate.

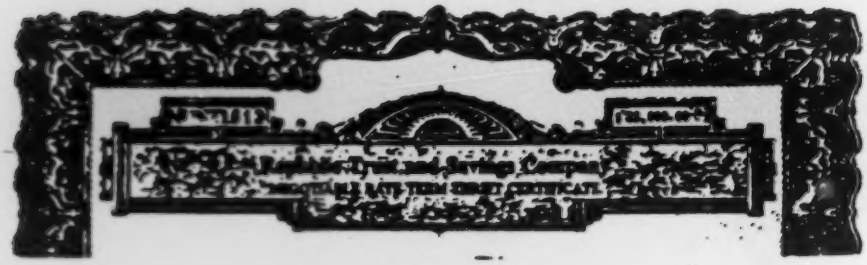
IN WITNESS WHEREOF, we have caused this certificate to be executed by a duly authorized officer of the Company this 6th day of June, 1984.

**REPUBLIC FINANCIAL CORPORATION**

**THE CERTIFICATE ISSUED HEREBY IS NOT INSURED BY ANY AGENCY OF A FEDERAL OR STATE GOVERNMENT**

Secretary

**Exhibit 20 to**
**Plaintiffs' Amended Complaint**



THIS IS TO CERTIFY that for value received this certificate has this date been issued to

R.H. Arnold or Marvel McDaniel

for and in consideration of the sum of $25,000.00

Dollars cash in hand paid, the receipt of which is hereby acknowledged. This certificate shall bear interest at 13.25% per annum, compounded or payable quarterly and shall be due and payable 1 year(s) from date and shall be payable only upon surrender of this certificate. The Company reserves the right to redeem this certificate at any time after issue upon thirty (30) days written notice to the holder hereof of its intention to redeem. The holder of this certificate may redeem this certificate at any time after issue provided, however, that the Company may require thirty (30) days written notice to the Company of such intention to redeem and that the Company reserves the right to limit all redemptions of certificates in any calendar month to fifty percent (50%) of the net cash flow of the Company for the preceding calendar month; and further provided that a substantial early withdrawal interest penalty will apply. In the event of early withdrawal, this certificate will receive interest equal to the rate currently in effect for Passbook Savings Certificates less an amount equal to three months at such rate..

IN WITNESS WHEREOF, we have caused this certificate to be executed by a duly authorized officer of the Company this 30 day of July, 1984

Teresa A. Budelli
Asst. Secretary

REPUBLIC TRUST AND LOAN ASSOCIATION
Vice President